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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE STEAMSHIP *Benito Estenger*, ARTHUR ELLIOT BEATTIE, Claimant, *Appellant*,

v.

THE UNITED STATES.

No. 192.

BRIEF AND ARGUMENT ON BEHALF OF CAPTORS.

Statement of Case.

This is an appeal from a decree in prize of the District Court of the United States for the Southern District of Florida. The libel in prize (Rec. p. 1) filed July 2, 1898, alleges the capture of the steamer *Benito Estenger* by the U. S. S. *Hornet* on June 27, 1898, as prize of war, and prays its condemnation and forfeiture to the United States. Depositions were taken *in preparatorio* on July 21, 1898.

A claim was interposed July 27, by Baldomero Perez (p. 19) as master of the steamer, on behalf of Arthur E. Beattie, a British subject, as owner, and supported by affidavits of himself and of Enrique de Mesa.

An order for further proof was made, and, upon final hearing on depositions taken on both sides under this

order, the vessel was condemned as prize December 27, 1898, on the ground, as stated in the decree (p. 25), of "it appearing to the court that the said S. S. *Benito Estenger* is enemy's property."

Eight assignments of error were alleged (p. 25) amounting to these two: (1) that the vessel was a British vessel; (2) that the vessel at the time of its capture was actually engaged in aiding the United States in its war with Spain.

Undisputed Facts.

The following facts are undisputed:

The vessel prior to June 9, 1898, was the property of Enrique de Mesa or of the firm of Gallego, de Mesa & Co., subjects of Spain and residents of Cuba.

On the 9th of June, 1898, a bill of sale was made by Mesa to Arthur E. Beattie, the claimant, a British subject, and upon apparent compliance with the requirements of the British law governing registration it was registered as a British vessel in the port of Kingston, Jamaica.

The vessel had, prior to this time, been engaged in trading with the Island of Cuba, and more particularly between Kingston and Montego, Jamaica, and Manzanillo, Cuba. After the transfer of ownership, it continued in the same trade. It left Kingston on June 23, 1898, with a cargo of provisions for Manzanillo, and on June 27, at about 2 o'clock A. M. left Manzanillo for Montego, and then for Kingston. It was captured about 5.30 A. M. of the same day. Mesa was on board as supercargo, and his request to be taken to Admiral Sampson was denied.

Disputed Facts.

The disputed facts are: (1) the conditions of the transfer to the British flag, and (2) the circumstances under which the voyage was made.

The Conditions of the Transfer.

The captors aver that the assignment was merely colorable with a view to giving the owner, a Spanish subject, an opportunity to continue the use of his vessel with impunity in spite of the war. For a discussion of this question it is necessary to refer to the evidence in detail.

In the deposition *in preparatorio*, Mesa testifies (p. 15) in these terms: "She was sold at Kingston, for $40,000, which sum has already been paid." The reason given for the sale is that he was obliged to get money for his family to live on. This deposition is dated July 21, 1898. In his test affidavit (p. 21), July 27, 1898, he swore to the sale of the vessel for $40,000, "the deponent being, at the same time, indebted to the said firm of Beattie & Co., a large part of which consideration of $40,000 was credited by the said Arthur E. Beattie on the indebtedness of him, the said deponent."

Jose V. Perez, purser of the vessel, in his deposition *in preparatorio* (p. 18) testified that Mesa told him that the ship was sold for the support of his family.

John Orrett, in a deposition taken for the claimant, manager of the ship brokerage business of E. G. Orrett, at Kingston, attempts (p. 35) to give some particulars of the purchase, but evidently states only hearsay, giving the price as £9,000, but says that he is unable to say what arrangements were made for payment and how the purchase money was paid.

S. E. P. Pietersz (p. 37), an accountant in Orrett's office, knows the price was £9,000, without saying how he knows it, "which he believes was *bona fide* paid; in what shape or how, witness does not know."

Beattie, the alleged purchaser, testifies (p. 38) that he bought the vessel for purposes of trade; (p. 40) that he was the sole *bona-fide* owner; (p. 42) that he bought the vessel for £9,000 and received a formal bill of sale

and possession of the steamer. The deposition then continues:

"He declines to say of what the payment or payments of the purchase money consisted, but states that the sale was a *bona-fide* one."

It is a notable circumstance that the parties to the alleged sale do not even agree as to the price, one saying $40,000 and the other £9,000, two substantially different sums. Doubtless the reason for this is that no consideration passed.

Louis A. Dent, U. S. Consul at Kingston, was the only witness called for the United States. He testified (p. 55) as follows:

"I had a conversation with Arthur E. Beattie in the Myrtle Bank hotel, in Kingston, Jamaica, I think a few days after the *Bonita Estenger* left Jamaica, in which I suggested to Mr. Beattie that the change of flag of the vessel was a fraudulent one, and that by his having sworn to the declaration of ownership he rendered himself liable to prosecution under the British merchants' shipping act. Mr. Beattie did not deny that such was the fact, but replied that he had signed the declaration to oblige Mr. Mesa, who was an old friend of his. This was the sum and substance of the conversation, which was desultory and not continued.

"Q. Where did this conversation take place?

"A. In the Myrtle Bank Hotel, at Kingston, where we were both residing. Subsequent to the seizure of the *Benita Estenger* and of Mr Beattie's own vessel, called the *Greenan Castle*, Mr. Beattie called upon me at my office and requested me to use my good offices to secure the release of the latter. (Mr Putnam objected to any reference to the *Greenan Castle*). I told Mr. Beattie that I was satisfied to help him with respect to the *Greenan Castle*, but that he must not expect me to do anything to aid him with regard to the *Benita Estenger;* that he knew that I knew, and we were both well aware of the fact, that the transfer was fraudulent, and that I could do nothing

to aid him with regard to that vessel. I said to him that I regretted the position in which he had placed himself, rendering him liable to prosecution by the British authorities. I asked him the direct question whether my charge was not correct. Mr. Beattie was very much disturbed; said to me that he realized the position in which he had placed himself; that he regretted it very much; that Mr. Messa had not treated him properly; should never have asked him to sign the declaration, and that he had not paid anything for the vessel, but that his plea would be that the vessel was really his, having been given to him absolutely by Mr. Messa; to which I replied, 'Given to you, I presume, to be returned after the war was over; given to you for the purpose of effecting the transfer and protecting the vessel'; which facts Mr. Beattie admitted to me were true."

We submit that this evidence clearly shows an attempt to make an assignment solely for the purpose of evading capture.

The Circumstances of the Voyage.

The captors maintain also that the evidence shows the continued relations of Mesa and Perez to the vessel exactly consistent with the theory of continued ownership by Mesa.

In his test affidavit, Perez (p. 20) states that Mesa continued on the vessel as supercargo and details a conversation between him and the officer making the capture, in which Mesa clearly assumed the right of controlling and directing the movements of the vessel. Mesa himself says (p. 13) that he was in charge of the vessel. Beattie, the claimant, told Pietersz (p. 36) that Mesa had been made supercargo, and Beattie testifies (p. 40) to this appointment. In the entire testimony of Consul Dent (p. 54) Mesa appears as the person actually in charge of the vessel.

Thus, it would seem that the actual management of

the vessel admittedly continued just the same as it had been before the alleged transfer.

Beattie says (p. 43) that before the purchase the captain was Baldomero Perez; that afterward he appointed Edwin Cole, a British subject, captain in conformity to British law, and that Perez was second mate and pilot.

Cole (p. 10) testifies that he was master of the vessel: had known it since June 21, had first seen it a week before, and that when he came aboard Perez was master.

Perez, however, says, in his test affidavit (p. 20), that Beattie came on board and told him that he could remain as master but that it would be necessary for him to put an English subject on board as first officer or second captain. In his deposition *in preparatorio* he says positively (p. 7): "I am the master of the vessel," and (p. 8) "I belong to the vessel in the capacity of master." He makes no reference to having been superseded. In the claim presented by Perez on behalf of Beattie, on which the present appearance in court is based, he says "that he is the master of the said steamer."

Cole makes no other appearance in the case than by his deposition *in preparatorio*, nor did it occur to him to file the claim in court for the alleged owner. Mesa (p. 13) has nothing to say about Cole, but declares that the master of the ship was Perez, and the purser, Jose V. Perez (p. 16), says Perez was master. The only other witness who mentions Cole is E. G. Orrett (p. 46), the broker in whose office the sale was made, who says that Cole, a British master, was appointed on his recommendation.

All this evidence leads clearly to the conclusion that Cole's appointment was merely nominal, and that Perez continued master, subject only to the orders of Mesa, nominally supercargo, but really owner.

There are some few circumstances showing the *mala fides* of the alleged sale which deserve not to be entirely

overlooked. The Spanish flag, it appears, was still on board (pp. 7, 13, 16), as well as the master of the vessel whom Perez is stated to have succeeded, a Spaniard named Genero Pasaron (pp. 9, 12, 15, 18). Testimony is given showing that the vessel carried goods to Manzanillo on this voyage, under a contract with one Flouriache (p. 39). That contract would doubtless have afforded some light upon the question of real ownership, but it is not produced. It is necessarily inferred that it would contradict the position asserted by the claimant. Its absence is alone a declaration of claimant's unwillingness to disclose all the facts relating to the voyage.

The Transfer Not Bona Fide.

All this evidence leads positively to the conclusion that there was no actual transfer of the ownership of this vessel. The failure of the parties to state the terms of the transfer, their disagreement as to the price, the contradiction between the allegation that the sale was to raise money for his family and the fact that no cash payment was made, the refusal of the claimant to say how the payment was made, the failure to produce the contract with Flouriache, would, in the absence of the damaging admissions to Consul Dent, have prevented his establishing his claim. With his admissions, the contrary of his allegations is proved. The burden is upon him and simply on his failure the property must be condemned, but as he has admitted the lack of good faith in the sale, the ground of condemnation is proved beyond controversy.

No less forcible as showing the merely colorable purpose of the transfer of title is the contradiction in regard to who was the master. As the British law requires a British subject to be master, Cole seems to have occupied some nominal position on board, but all the testimony, as

well as the conspicuous act of Perez in presenting the claim for Beattie, contradicts Beattie's assertion that Cole was master. The entire weight of evidence is that Perez continued, as before, master of the vessel under the command of Mesa as owner.

Legal Effect of Facts.

A very similar case to this is that of the Island Belle (13 Fed. Cases, 168) decided in the District Court for the Eastern District of Pennsylvania. An attempt, in many respects similar to this, to transfer title purely for purposes of protection was there disclosed. The court there said (p. 171):

"The rule of decision in some countries has been that, as to a vessel, no change of ownership during hostilities can be regarded in a prize court. In the United States, as in England, the strictness of this rule is not observed. But no change of property is recognized where the disposition and control of a vessel continued in the former agent of her former hostile proprietors; more especially when, as in this case, he is a person whose relations of residence are hostile. That such were the relations of Captain Phillips is apparent. Maritime hostilities could not be prosecuted with any effect if this rule did not apply in an extreme case like this. A vessel, beneficially owned by hostile persons, navigated by a hostile person who is her nominal owner, is transferred by him to their own commercial agent in a foreign country, who immediately executes powers to the same navigator, enabling him not only to conduct and manage her future employment, but to sell her. If, therefore, the case were, as Mr. Sawyer, or as his advocate, states it, she should, I think, be condemned. I am not aware that there was ever so thin a veil thrown over trade of a hostile district to protect a vessel from capture."

This decision follows the decisions of Sir William Scott

on the same subject. In *The Omnibus* (6 C. Rob. 71) the case is reported as follows:

"The only question is whether this ship and cargo are the property of Mr. Ruyl, for whom they are claimed. It is admitted to have been a British ship, transferred at the beginning of the war to the father of the present, who was also the former master, and it is asserted to have been again sold by him to the present claimant. It appears, however, that the vessel continued under the management of the former master, and in the same course of trade in which it had been always employed from Guernsey to Amsterdam, never once going to the port of her pretended owner; and though the master professes to have corresponded with Mr. Ruyl, not a scrap of any such correspondence is produced. The court has often had occasion to observe, that where a ship asserted to have been transferred, is continued under the former agency and in the former habits of trade, not all the swearing in the world will convince it that it is a genuine transaction. The present case has none of the marks of a real transfer upon it. The former master is not only continued but it is made one of the stipulations of the bill of sale, that he shall not be removed. How can the purchaser be said to acquire the right of property under a bill of sale with such a clause, carrying with it a defeazance of the title which it pretends to convey. I have no hesitation in pronouncing that Mr. Ruyl has no interest in this property. The letters from the persons in Holland, to Mr. Priaulx of Guernsey, intimate as much by such expressions as these. 'We advise you not to send back this vessel till we apprize you how things go here.' Would they have written so to the correspondent at Guernsey if the property had belonged to Mr. Ruyl, their neighbor at Embden? These are marks of an interest at Guernsey. It is sufficient, however, to pronounce that the property is not shown to belong to the claimant. As the ship and cargo are involved in the same transaction, and in the same claim, they will both be subject to condemnation."

Shortly after, in *The Flora* (3 C. Rob. 360) the same judge had before him the following state of facts:

"This was the case of a ship taken under a Portuguese flag and pass, and claimed under the treaty. The ship had been a Prussian vessel, transferred to the asserted Portuguese proprietor subsequent to Prussian hostilities. The case was ordered to further proof, and on the 18th of February, 1807, it came on again when it appeared that the vessel had been originally a Dutch vessel, transferred to a Prussian owner on the commencement of Dutch hostilities, in whose employment she had continued till July, 1806, when the vessel was lying at Lisbon, and was there transferred to M. De Souza, under circumstances that appeared to the court, in the discussion of the further proof to falsify the whole transaction."

The claim for ship and cargo was rejected under these conditions, the transfer being considered wanting in *bona fides*.

A note annexed to the above case is as follows:

"In the cases of the *Nostra Seignora de Rosario* and the *Nova Unias*, 11th Novr., 1806.—The King's Advocate intimated that although in some Portuguese cases under the treaty, restitution had passed without objection being taken to the fact of their appearing to have been enemies' ships transferred to the asserted Portuguese proprietor subsequent to hostilities, yet as the practice of resorting to transfers of this kind for the purpose of placing the navigation of the enemy under the protection of a privileged flag, had been growing more prevalent, and was liable to great abuse, he should hold himself at liberty to argue the point, whether the privilege of the treaty could extend to ships purchased of the enemy in any case in which it might appear advisable. In a subsequent case, the *Principe Regente* (27th Oct., 1807) where it was contended in argument that this point had been settled in cases that had already passed. The court expressly declared that it did not consider that question *to have been decided*. That it was a question of great importance and

one that was very fit to be reserved for grave consideration. That case was decided entirely on the facts."

Many authorities, indeed, hold that any transfer of title to vessels of a belligerent *flagrante bello* is void. It is not necessary, in this case, to invoke the full extremity of this doctrine. It has been sufficiently shown in this case that the transfer was colorable only, for purposes of protection, the claimant indeed admitting it, and that the control and operation of the vessel continued after the asserted transfer just the same as before. This brings it wholly within the doctrine of the cases cited. The vessel was enemy's property and is subject to condemnation.

The Vessel Not in the United States Service.

The rather astonishing claim is made (p. 25) that at the time of the capture the vessel was actually engaged in aiding the United States and was therefore protected from capture, for this is the net meaning of the fifth to eighth assignments of error (p. 25). A slight consideration of the evidence disposes of this contention.

It was not thought of when the depositions *in preparatorio* were taken July 21, 1898. Baldomero Perez (p. 9), master of the vessel, then testified that at the time of the capture, June 27, 5 30 A. M, they were steering toward Montego Bay. Cole (p. 12), the reputed master, said the same thing, adding, "We steered on a direct course from Manzanillo up to the time we were captured." Mesa, the supercargo (p. 15), then said that she was steering for Montego Bay, adding that "her course was at all times towards the point for which she appears to have been destined from her papers." J. V. Perez, the purser (p. 18), says the same thing. We are struck by the fact that all these witnesses are aiming to show the integrity of their purpose in keeping a direct course.

In the test affidavits of Perez and Mesa, July 27, a new feature is introduced, not disclosed in the earlier depositions. Perez (p. 20) says that on June 27, at 2 A. M., the steamer came out of Manzanillo and Mesa told him that he would communicate with Admiral Sampson at Santiago, if possible. Mesa says (p. 22) that it was understood by all the officers on board that the vessel would make for Sampson's fleet, where deponent would have his interview with Sampson.

Neither Mesa nor Perez were again examined under the order for further proof, but in the testimony of the claimant Beattie, an account is given (p. 40) of an interview between Mesa, Beattie, and United States Consul Dent at Kingston, Jamaica, as follows:

"Previous to the sailing of the *Benito Estenger* for Manzanillo, Enrique de Mesa, witness' supercargo, and witness had an interview with United States Consul Dent, when Mesa gave the consul bearings of the harbor of St. Jorgo de Cuba, and also an original plan of the eastern province of the Island of Cuba. Consul Dent then proposed that Mesa, with the ship, should meet Admiral Sampson after the the cargo had been discharged at Manzanillo, and that the vessel with this object should be off Cape Cruz on the 30th of June for the purpose of meeting a United States man-of-war, which would convoy the vessel up to the fleet under the command of the admiral, who was then blockading Santiago de Cuba, and there give Admiral Sampson certain information as to the approaches to the harbor of Santiago. This, as owner of the *Benito Estenger*, he consented to, and impressed upon Mesa the importance of keeping the appointment. He also impressed upon Consul Dent the necessity of prohibiting him as owner of the vessel against a breach of the neutrality laws, he, the witness, being a British subject. He went to the interview solely to act as interpreter for Mesa, and at his request. During the interview Consul Dent proposed the appointment with Admiral Sampson and witness acquiesced. Consul Dent assured him

that his interests as owner of the *Benito Estenger* would be protected. She was captured upon the 27th of June, and therefore did not have an opportunity of keeping the appointment that the consul had made with Mesa and the witness for the 30th of June."

Consul Dent's letter to Admiral Sampson in relation to this interview appears on pages 77–79. The portion particularly relating to this subject is as follows (p. 78):

"His vessel leaves to-morrow night for Montego Bay for Manzanillo, and he has assented to my suggestion as follows: When he leaves Manzanillo he will be presumed to go to Trinidad to bring refugees to Jamaica, but he will come outside of the keys and stand off twenty miles from Cape Cruz due west, where a cruiser can pick him up, ostensibly detain his vessel for examination, take her to the fleet, where you can interview him to any extent you may desire, if you see fit. The object of apparently capturing him will be to disarm suspicion on the part of the Spaniards, who would well know his vessel.

"If you care to avail yourself of this plan you could send a vessel to the point named Wednesday night. Mesa has made the appointment for that place Thursday morning, June 30.

"You quite understand that in dealing with those people one is always more or less liable to imposition. I therefore make no recommendation of Mesa to you. I simply give you the opportunity to get information, perhaps of value, and to judge of the man for yourself, as I have done."

In Dent's oral testimony he states positively (p. 59) that he told Mesa that Manzanillo was blockaded and denies positively any agreement with Mesa by which he was to be protected because of rendering services to the United States, saying distinctly (p. 56) that he refused to give him a safe conduct.

It is evident upon this testimony that the claimant has entirely failed to prove any such extraordinary state of affairs as he claims, that the United States Consul entered into an agreement whereby he should be permitted to enter the port of Manzanillo, and discharge his cargo and return without interruption, on consideration of furnishing information to Admiral Sampson on his return. Yet, even if such an agreement were established, the facts disclosed render it impossible to claim it as a protection because the stipulations on Mesa's part were not carried out. The date set, as seen by Consul Dent's letter (p. 78) for meeting a vessel of Admiral Sampson's fleet was June 30 and the place twenty miles west of Cape Cruz. As a matter of fact the vessel was captured on June 27, when the witnesses on board all agree that she was making no effort to reach any point agreed on, but was proceeding directly on her voyage to Montego and from there to Kingston. It is thus established that, even had the agreement been made, as asserted by them and denied by Consul Dent, they had abandoned any intention of carrying it out. Consequently any protection which they might have claimed, resulting from their performance of the agreement is lost to them.

The Vessel Carried Contraband.

It appears from the testimony of Beattie (p. 39) that the vessel was carrying a cargo of food stuffs chartered by one Flouriache. Mesa (p. 14) mentions rice, flour, corn-meal and coffee. Perez (p. 8) flour and Indian meal. Cole, the nominal master, (p. 10, interrogatory 8) evades answering the question and Perez, in his test affidavit (p. 20) says that the provisions were consigned to Beattie & Co. Consul Dent (p. 56) refers to the cargo as flour. On page 58, he gives an account derived from the admission

of Beattie as to what became of the flour, as follows (p. 58):

"I had also information from Mr. Arthur E. Beattie, and subsequently from Mr. Thomas Beattie, that the cargo was flour, and was landed in the warehouse of Bauriedel & Company, of Manzanillo, and from that warehouse transferred to the adjoining warehouse, which was the Spanish Government warehouse.

"Q. Have you any information from Mr. Beattie that that cargo of flour was delivered to Spanish authorities?

"A. The information was, as I said, from both the Messrs. Beattie, that the flour was transferred by Bauriedel & Company, through a communicating way from their warehouse to the government warehouse, immediately upon its delivery. Mr. Thomas W. Beattie informed me that he saw, personally, the flour was transferred, being then in Manzanillo.

"Q. Had you any information from Mr. Arthur Beattie?

"A. Mr. Arthur Beattie gave the same information, but did not say that he saw the same personally transferred.

"Q. Do I understand you to state as a matter of fact that Arthur Beattie said that the flour was transferred to the warehouse of the Spanish Government?

"A. Yes; it was transferred from the warehouse of Bauriedel & Company to the warehouse of the Spanish government adjoining, in Manjanillo."

A noticeable reticence is observed in regard to this cargo and its destination in all the depositions *in preparatorio* and in those taken for the claimant. This accounts for the absence of the contract with Flouriache.

It is pertinent to inquire into the conditions at the port of Manzanillo at the time of the landing of this cargo of flour and other food supplies. The Appendix to the Report of the Bureau of Navigation of the Navy Department for the year 1898, published as an official document and

therefore within the judicial notice of this court, shows that this was an important naval and military station under control of the enemy and containing so large a force that no less than four separate naval engagements took place in and about the port with a view to sinking the naval vessels and destroying the fortifications there.

On page 227 is the report of the commander of the expedition of the engagement of June 30, 1898, in which the United States naval vessels *Hist*, *Hornet* and *Wompatuck* took part. They were met by fire from gunboats, from shore batteries, and from soldiers on shore, and on account of serious damage to the *Hornet*, although three Spanish vessels were sunk in the engagement, the American vessels were obliged to withdraw, the *Hornet* being taken in tow. The second engagement on the next day (p. 223) was on the part of the *Scorpion* and *Osceola*, which were opposed by five armed vessels and five batteries having many guns, some of them large, and by musketry all along the shore. This resulted in the withdrawal of the attacking vessels. The third engagement was on July 18, 1898 (p. 261), when the attacking squadron consisted of all the vessels participating in the two former attacks reinforced by the *Wilmington* and *Helena*. The result was the destruction of ten Spanish vessels, in spite of a vigorous fire both from these and from shore batteries and from musketry. The last engagement was on August 12, 1898 (p. 301), when the port was attacked by the *Newark*, *Resolute*, *Suwanee*, *Hist*, *Osceola* and *Alvarado*. A vigorous fire was opened by these vessels, and this was returned by shore batteries. The impending capture of the port was avoided by receipt of news of the protocol of peace.

In a report made by Lieut. Lucien Young, commanding the *Hist*, which took part in three of these engagements (*Id.* p. 299), it appears that about five thousand armed Spanish

troops were in Manzanillo. It thus appears that this was an important fortified place containing a large number of troops, important fortifications and many vessels of war. It is a place which would require for the subsistence of these troops a large amount of flour and other provisions, and there can be no doubt that the voyage of the *Benito Estenger* was for the purpose of supplying the needs of the garrison.

In the case of the *Jonge Margaretha* (1 C. Rob. 192) it was decided by Sir William Scott that provisions are contraband when intended for the military use of the enemy. This case is approved and the doctrine sustained in *The Commercen*, 1 Wh. 382, in an opinion by Justice Story as follows:

"By the modern law of nations, provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. 1 Rob. 189. *The Jonge Margaretha.* If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband. But it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband."

In *The Peterhoff*, 5 Wall. 28, this court by Chief Justice Chase, said (p. 58):

"The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and

the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege."

Under these conditions it can not be said that the claimant has shown the innocent purposes of the cargo. Even were the vessel of itself *bona fide* neutral, the carrying of contraband would warrant its condemnation.

It is to be noted also, although the President's proclamation of blockade was not issued until June 27, yet Consul Dent had notified Mesa, before he started on his voyage, of the existence of a *de facto* blockade.

Conclusion.

An examination of the whole record in this case discloses an entire want of that frankness which the authorities declare must be the special attribute of a claimant seeking release of a captured vessel. The refusal to disclose the facts of the transfer, the claimant's admissions, the unchanged position of Mesa, the relations between Cole, the nominal, and Perez, the actual master, the silence as to the purpose for which the cargo was intended, the pretended purpose of meeting Admiral Sampson, all these facts destroy any possibility of *bona fides* in the case and make clear the duty of the court to sustain the decree below. The words of Justice Story in the note by him appended to 1st Wheaton, 494, are directly applicable to this case:

"If upon further proof ordered, no proof is adduced, or

the proof be defective, or the parties refuse to swear, or swear evasively, it is deemed conclusive evidence of hostile interests or of such misconduct as authorizes condemnation."

It may well be said of the claimant in this case as was said by Chief Justice Chase in *The Peterhoff*, 5 Wall. 62:

"We must say that his conduct was inconsistent with the frankness and good faith to which neutrals, engaged in commerce open to great suspicion, are most strongly bound."

GEORGE A KING,
WILLIAM B. KING,
Proctors for Appellee, on behalf of Captors.